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IN THE
SUPREME COURT OF THE UNITED STATES
1984 Term

No. _____

THE HEIL COMPANY, Petitioner,

v.

JESSIE W. MELLER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March 30, 1984

QUESTION PRESENTED

Whether evidence of subsequent remedial measures implemented by a defendant manufacturer in a products liability case is automatically admissible under Federal Rule of Evidence 407 unless the defendant unequivocally admits by formal stipulation that such precautionary measures were feasible at the time of manufacture even though the issue of feasibility of precautionary measures is not contested at trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, The Heil Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 16, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached as Appendix A. No opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit as to which review is sought was entered on January 16, 1984 (Appendix A).

A timely petition for rehearing *en banc* was denied on February 21, 1984 [A-20], and this petition for a writ of certiorari was filed within 90 days of that date.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether evidence of subsequent remedial measures implemented by a defendant manufacturer in a products liability case is automatically admissible under Federal Rule of Evidence 407 unless the defendant unequivocally admits by formal stipulation that such precautionary measures were feasible at the time of manufacture even though the issue of feasibility of precautionary measures is not contested at trial.

STATUTORY PROVISIONS INVOLVED

Fed. R. Evid. 407: Subsequent remedial measures

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

STATEMENT OF THE CASE

Petitioner is the manufacturer of a dump truck bed assembly. Respondent is surviving spouse of Jean Meller, who died while performing maintenance on the vehicle. Respondent sued petitioner under the Colorado Wrongful Death Statute, C.R.S. 1973 §§ 13-21-202 & -203, alleging that her husband's death was caused by the defective design of the "trip cable" mechanism (contact with which while the dump bed was in a raised position could cause the bed to descend) and by petitioner's failure to provide appropriate warnings to ultimate users of the vehicle concerning this danger. Respondent produced evidence at trial which indicated that the decedant touched the trip cable while lubricating the vehicle with his body positioned between the chassis and the dump bed, thereby causing the bed to descend and resulting in his death.

In attempting to prove that the design of the dump bed was defective, respondent, over objection of the defendant, introduced evidence of various design changes made by petitioner subsequent to the sale of the product to decedent's employer and other safeguards which could have been employed at the time of the accident and which might have prevented the decedent's death. This evidence included a design modification developed by the petitioner concerning the hydraulic valve which controlled the descent of the dump bed, evidence of the use of props to "block" the dump bed while it was in an upright position, and evidence of post-manufacture correspondence from the defendant warning of the dangers associated with use of the trip cable [A-4].

The record contains no evidence that the petitioner contested the feasibility of any of these subsequent remedial

measures. The petitioner maintained throughout trial that, although other design alternatives and safeguards could have been used in the design and manufacture of the dump bed assembly, the petitioner chose a dump bed design which was not defective under foreseeable operating conditions.

After denying petitioner's motion in limine based upon Rule 407 to exclude evidence of subsequent remedial measures, the trial court admitted respondent's evidence of precautionary measures with a cautionary instruction to the jury that the design changes "are not to be considered as an admission that earlier design [sic] was defective in any way; another way to do it, in other words" [A-4]. Verdict and judgment subsequently entered for the respondent.

Petitioner appealed, alleging as error, among others, the trial court's ruling admitting evidence of subsequent remedial measures on the ground that the feasibility of these measures was not a controverted issue at trial and thus this evidence was inadmissible under Rule 407.

The Court of Appeals held that the trial court properly admitted evidence of subsequent remedial measures under the controversion of feasibility exception to Rule 407, reasoning that proof of the feasibility of alternative designs and safeguards was an "essential" element in respondent's case, and therefore, unless the petitioner formally stipulated to the feasibility of these measures, plaintiff was obligated to prove this element of her case. Hence the issue of feasibility was "controverted" for purposes of Rule 407. Thus, even though the record was devoid of any evidence produced by the petitioner which controverted the feasibility issue, the Court determined that petitioner's failure to make an unequivocal admission of feasibility was, in and of itself, sufficient to raise a controversy as to the issue at trial [A-7, fn.7].

REASON FOR GRANTING THE WRIT

The decision below conflicts with the decisions of other Courts of Appeal as to the proper interpretation and application of Fed. R. Evid. 407 concerning the admissibility of subsequent remedial measures in products liability cases in which the manufacturer defendant offers no evidence contesting the feasibility of other precautionary measures.

Rule 407 is an exclusionary rule which prohibits, in a products liability case, a plaintiff from introducing at trial evidence of post-sale product changes implemented by a manufacturer as proof of a defect in an earlier made product. The salutary social policy behind the rule is to encourage manufacturers to improve the safety of their products without fear that evidence of such changes will be used against them in personal injury actions arising out of products from previous generations of the product line.

Rule 407 does not, however, require the exclusion of evidence of subsequent remedial measures if that evidence is offered to establish that the subsequent precautionary measures or alternative designs were feasible prior to the date of sale of the product in question.

The Advisory Committee Notes to Rule 407 "specifically recognize the use of subsequent remedial measures 'for the purpose of showing that design changes and safeguards were feasible.' " [A-6, fn.6, *citing* Fed. R. Evid. 407, Notes of Advisory Committee on Proposed Rules.]

Admission of such evidence, however, according to the clear terms of Rule 407, must be predicated upon the fact

that the issue of feasibility is *"controverted"* in the case at hand. Fed. R. Evid. 407 (emphasis added).

The importance of a uniform interpretation of Rule 407's "controversion" requirement cannot be gainsaid. The manufacturer is forced to choose between modifying the design of its product when safer, more advanced technology is available, and the unavoidable inference, if evidence of such changes is admissible, that the previous product was "unsafe" merely because the modification reflects a more advanced design. Rule 407 was specifically designed to protect manufacturers from this unjust inference and to encourage technical modification to improve safety.

Evidence of subsequent remedial measures is invariably damaging to the manufacturer in a product liability case. Rule 407 allows the manufacturer to prevent the introduction of this evidence by electing not to contest the issue of the feasibility of design modifications and safeguards at the trial level. Even if feasibility is controverted by the defendant at trial, a limiting instruction excluding jury consideration of the evidence for any purpose other than the feasibility issue is necessary to prevent prejudice to the defendant. See *Bauman v. Volkswagenwerk, A.G.*, 621 F.2d 230, 233 (6th Cir. 1980).

If, however, evidence of subsequent remedial measures is admitted in violation of Rule 407 when the issue of feasibility is not, in fact, controverted at trial, the evidence (even with the limiting instruction) is "cumulative at best and prejudicial at worse." *Knight v. Otis Elevator Co.*, 596 F.2d 84, 91 (3d Cir. 1979); see *Rimkus v. Northwestern Colorado Ski Corp.*, 706 F.2d 1060, 1065 (10th Cir. 1983), *citing Knight v. Otis Elevator Company, supra.*

Indeed, the giving of a limiting instruction such as that given by the trial court here is, itself, prejudicial when feasibility is not contested by evidence or argument at trial because it clearly suggests to the jury that the defendant was obdurately contesting an issue as to which "controversy" it offered no evidence whatsoever.

It is clear that a uniform interpretation of the controversion requirement in Rule 407 is necessary to implement the social policy at the root of this evidentiary rule. A uniform interpretation is required by the overriding federal interest in providing a uniform, coherent body of procedural and evidentiary law upon which *all* federal litigants may rely. *See* 28 U.S.C. § 2072 (1982).

In denying petitioner's appeal, the Court of Appeals held that the issue of the feasibility of alternative designs and safeguards was an "essential" factor to respondent's theory of product liability against the petitioner [A-7, fn.7]. Relying on legal commentary by S. Saltzburg and K. Redden in the *Federal Rules of Evidence Manual* (3d ed. 1982), the appellate court held that feasibility will "almost always" be in question in design defect cases [A-7, fn.7]. The court then reasoned that, if the respondent was required to establish feasibility as an element of her case, the issue was automatically controverted at trial, *unless* the petitioner made an unequivocal admission of the feasibility of design changes and safeguards, thereby removing the necessity for the introduction of any evidence by the respondent on that issue. *[Id.]*

The appellate court based its imposition of this affirmative duty to stipulate upon a proposal for a uniform rule suggested by two legal commentators:

> The administration of Rule 407 would be greatly simplified if the appellate courts were to hold that in all of these [negligence and product liability] situations, feasibility of precautionary measures will be deemed "controverted" unless the defendant is prepared to make an unequivocal admission of feasibility.

23 C. Wright & K. Graham, *Federal Practice and Procedure,* §5288 at 144 (1980). Important to note is that no stipulation as to the feasibility of design changes and safeguards was ever requested by the respondent in this case.

The Court of Appeals cited no federal or state authority in support of its interpretation of Rule 407's "controversion" requirement. Petitioner's research reveals no such legal authority. The only case law which addresses the controversion issue in the context of Rule 407 is directly and diametrically opposed to the decision of the Tenth Circuit in this case.

Decisions in the Third, Fourth, Fifth and Sixth Circuits have addressed this identical issue in the context of products liability cases and have determined, not only that the feasibility issue is not automatically controverted in every product liability design defect case absent a formal stipulation that other measures were feasible, but that the issue of feasibility is *not* controverted at trial unless the *defendant* introduces evidence to demonstrate the impossibility of design changes and safeguards prior to the time of sale of the product. *Granada Steel Ind., Inc. v. Alabama Oxygen Co., Inc.*, 695 F.2d 883, 888-889 (5th Cir. 1983); *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 854-855 (4th Cir. 1980), *cert. denied,* 499 U.S. 1080 (1980); *Bauman v. Volkswagenwerk, A.G., supra* at 233 (6th Cir. 1980);

Josephs v. Harris Corp., 677 F.2d 985, 991 (3d. Cir. 1982); *see Anderson v. Malloy*, 700 F.2d 1208, 1213 (8th Cir. 1983)(in a neglicence case, feasibility is not automatically controverted, unless evidence is introduced by the defendant).

Further, the Fourth and Fifth Circuits have specifically determined that an affirmative, unilateral duty to stipulate to feasibility *cannot* be imposed upon a defendant under Rule 407. *Granada Steel Ind., Inc. v. Alabama Oxygen Co., Inc., supra; Werner v. Upjohn Co., Inc., supra* at 855 ("It is clear from the face of the rule that an affirmative concession is not required.") Any other interpretation would impose a substantive, affirmative duty on the defendant manufacturer not contemplated or intended under Rule 407.

The rationale underlying the foregoing authorities and which requires the reversal of the Tenth Circuit's decision is set forth most persuasively in *Granada Steel Ind., Inc. v. Alabama Oxygen Co., Inc., supra.* Granada Steel sued Alabama Oxygen for damages resulting from a fire allegedly caused by a leaking acetylene gas cylinder belonging to the defendant. The trial court invoked Rule 407 to exclude evidence of defendant's post-manufacture remedial measures. On appeal, the Fifth Circuit Court of Appeals upheld the trial court's exclusion of the evidence, stating:

> Granada Steel argues that, even if Rule 407 applies, the evidence was admissible under the exception to that rule for evidence offered to show feasibility of precautionary measures. But this exception pertains if the issue of feasibility is contested. Granada Steel argues that, in design defect cases, feasibility is "inherently" an issue and an integral element of its proof. This, however, assumes that their claim that another design

> was feasible makes a contest. It takes two to tango, in court as well as on the ballroom floor, and the mere assertion that the manufacturer did not make a change does not controvert the feasibility of change. The manufacturer raised no issue that the alternative design suggested by Granada Steel's experts was not feasible. Its defense was only that the design it used was not defective.
>
> Feasibility may "almost always" be in question in design defect cases, as suggested by Professors S. Saltzburg and K. Redden, in their excellent *Federal Rules of Evidence Manual* 180 (3d. Ed. 1982). But "almost always" like "hardly ever" admits of the unusual case that prompts the qualifying adverb. Sometimes, as here, the manufacturer does not suggest that another design was impractical but only that it adopted an acceptable one. It is not obliged to prove perfection but only that the product "meets the reasonable expectations of the ordinary consumer as to its safety."

Id. at 888 (citation omitted). If feasibility is deemed inherently at issue and the defendant has no control over whether the issue of feasibility is controverted at trial, then the purpose of the protection afforded to defendants by Rule 407 is totally without effect. Evidence of subsequent remedial measures and design changes will *always* be introduced by the plaintiff because of its prejudicial effect on the defendant. This interpretation of the controversion requirement defeats the social policy which Rule 407 was designed to advance and cannot be allowed to control the admission of evidence under this Rule.

The Tenth Circuit's interpretation of Rule 407 also presents an impossible situation for a defendant manufac-

turer when a plaintiff elects to proceed simultaneously on negligence and strict liability theories. Under its ruling, in order to avoid evidence of subsequent remedial measures on the latter theory, the defendant must formally stipulate that other precautionary measures were feasible. As to the negligence claim, such a stipulation is tantamount, however, to an admission of liability.

At the present time there is no conformity among the United States Courts of Appeals as to whether Rule 407 even applies to a products liability action and can thus be used to exclude evidence of subsequent remedial measures. *See Granada Steel Ind., Inc. v. Alabama Oxygen Supply Co., Inc., supra* at 886-888 (providing an exhaustive summary of the cases and commentary among these circuits on this issue).

In the decision below, however, the Tenth Circuit elected to follow the majority view and apply Rule 407 in the products liability context "as written" [A-8, 9 fn.8; *but cf., Moe v. Avions Marcel Dassault-Breguet Aviation,* Nos. 82-1256, 82-1257, 82-1258 & 82-1259 (10th Cir. Jan. 30, 1984); *Herndon v. Seven-Bar Flying Service, Inc.*, 716 F.2d 1332 (10th Cir. 1983)(holding that Rule 407 does *not* apply in product liability cases)].

Having chosen to apply Rule 407 to products liability actions, the Tenth Circuit must be required to interpret Rule 407 in a manner consistent with its obvious purpose and with other United States Courts of Appeal. The conflict which exists among the Circuits concerning the interpretation of the "conversion" requirement in Rule 407 can be best categorized as a conflict between the Tenth Circuit and *every* other circuit which has addressed this issue. The Tenth Circuit cannot be allowed to impose a unilateral, substan-

tive, affirmative duty on a defendant to make an unequivocal admission as to the feasibility of subsequent design measures, when the defendant neither argues nor presents evidence that any design alternative or safeguard was not feasible prior to the sale of the product in question. The Tenth Circuit's interpretation of this Rule subverts the stated purpose of the Rule and prevents the uniform application of a Federal Rule of Evidence, conflicting, as it does, with every other circuit which has addressed the issues.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that its petition for a writ of certiorari to the Tenth Circuit Court of Appeals be granted.

Respectfully submitted,

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March 30, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 1984, three copies of this "PETITION FOR WRIT OF CERTIORARI" were mailed, postage prepaid, to James L. Hammer, Esq., 555 South DTC Parkway, Suite 160, Englewood, Colorado 80111, Counsel for Respondent. I further certify that all parties required to be served have been served.

THOMAS L. ROBERTS
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JESSIE W. MELLER,	)	
	)	
Plaintiff-Appellee and	)	
Cross-Appellant,	)	
	)	Nos. 82-1858
vs.	)	82-1883
	)	
THE HEIL COMPANY,	)	
	)	
Defendant-Appellant	)	
and Cross-Appellee.	)	

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. 80-M-668)

Submitted on the Briefs:

Thomas L. Roberts of Pryor, Carney and Johnson, Englewood, Colorado, for Defendant-Appellant and Cross-Appellee.

James L. Hammer of Gueck & Hammer, Englewood, Colorado, for Plaintiff-Appellee and Cross-Appellant.

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Jean Meller drove a dump truck for a Colorado employer. On May 21, 1979, his body was discovered pinned between the dump bed and chassis of his truck. It appears that Mr. Meller was greasing the chassis when the bed released from an upright position.

Mr. Meller's wife, Jessie Meller, filed this diversity action for wrongful death under Colorado law[1] against The Heil Company, the manufacturer of the dump bed assembly. She charged that Heil was strictly liable in tort for defective design. A jury agreed and the court entered judgment against Heil for $431,024.13 plus costs.

Heil appeals from the judgment, claiming that the court erred in admitting evidence of post-manufacture changes in the design of the dump bed assembly, in excluding evidence of drug paraphernalia that was in the decedent's possession at the time of his death, in failing to instruct the jury on the defense theory of product misuse, and in failing to set aside the verdict as excessive. The plaintiff cross-appeals, claiming that the court incorrectly calculated the bill of costs and interest on the judgment.

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1. *See* Colo. Rev. Stat. §§13-21-201 to 204 (1973 & Supp. 1982).

Post-Manufacture Design Changes

Heil's dump bed assembly uses a hydraulic hoist to raise the bed from the chassis. The hoist consists of a telescoping cylinder attached to the front end of the dump bed and an hydraulic-oil pump powered by the truck engine. The pump forces oil into the cylinder, causing the cylinder to elongate and the dump bed to rise. The elevation of the bed is controlled by a three-position valve. The first position admits oil into the cylinder, raising the dump bed. The second position halts the oil flow, maintaining the dump bed at a given level. The third position drains oil from the cylinder, contracting the cylinder and lowering the dump bed. When the cylinder is fully extended and the bed fully raised, a "trip cable" automatically switches the valve from the first to the second position to prevent overpressuring of the cylinder. The trip cable runs from the valve, along the chassis, to the dump bed. As the bed ascends, the cable tautens and mechanically switches the valve to the second position, stopping the movement of the cylinder and the bed. Under Heil's design, further stretching of the cable switches the valve to the third position, draining the hydraulic oil from the cylinder and lowering the bed.

The evidence at trial suggested that Mr. Meller inadvertently touched an unshrouded position of the trip cable while working beneath the fully elevated dump bed. His contact was sufficient to switch the valve from the second to the third position and drop the bed before he could escape.[2] The plaintiff claimed that the accident occurred

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2. The evidence indicated that an application of approximately eight pounds of pressure on the cable would switch the valve position. When the valve was switched, the bed would descend in about two seconds.

because Heil's design of the dump bed assembly was unreasonably dangerous and therefore defective under Colorado law. *See Union Supply Co. v. Pust,* 196 Colo. 162, 583 P.2d 276, 280 (1978).

In attempting to prove that the design was unreasonably dangerous, the plaintiff offered evidence of Heil's subsequent design changes. The evidence included changes in the valve design, the addition of props used to block the dump bed when it was in an upright position, and correspondence from Heil warning of dangers associated with the trip cable. The court admitted the evidence with a cautionary instruction to the jury that the design changes "are not to be considered as an admission that earlier design was defective in any way, but simply that there is possibly an alternative feasible design; another way to do it, in other words." Record, vol. 4, at 19. The defendant contends that the admission of this evidence violated Rules 407 and 403 of the Federal Rules of Evidence, as well as substantive provisions of Colorado law.

Rule 407 provides as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Fed R. Evid. 407. The Advisory Committee note indicates that the rule has two justifications. First, subsequent remedial measures are of limited probative value as an admission of fault. Second, and more importantly, exclusion of remedial measures favors "a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407 advisory committee note.

While Rule 407 recognizes the importance of encouraging safety improvements, it also recognizes that this salutory social policy must be balanced against competing interests.[3] Chief among these other interests is the admission of relevant, probative evidence. Rule 407 strikes a balance by excluding subsequent remedial measures only when used as evidence of the defendant's "negligence or culpable conduct."[4] It permits introduction of such measures to

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3. Rule 407 does not ban the admission of all "repair evidence." Instead, it selectively excludes such evidence, depending on the purpose for which it is offered. In doing so, Rule 407 implicitly recognizes that there are interests that override the policy of encouraging subsequent remedial measures. In this sense, Rule 407 represents a balance of competing interests rather than a broad social policy directive.

4. The Advisory Committee note states, "Exclusion is called for *only* when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect, [the rule] rejects the suggested inference that fault is admitted." Fed. R. Evid. 407 advisory committee note (emphasis added).

prove other controverted issues, provided that introduction of this evidence meets the remaining admissibility requirements of the Federal Rules of Evidence.[5]

In the instant case, the plaintiff presented a claim of strict liability in tort. She alleged that Heil's product design was unreasonably dangerous, and she offered evidence of subsequent remedial measures to show the feasibility of alternative designs. The evidence was not offered to show negligence or culpable conduct, but instead for a purpose permissible under Rule 407.[6] Contrary to Heil's assertions,

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5. *See id.* Neither the Advisory Committee note nor the legislative history of the rule indicate why repair evidence is excluded only when offered to show "negligence or culpable conduct." The choice of this particular standard presumably reflects a conclusion by the drafters that such evidence, on balance, is markedly less probative on these particular issues than on others.

6. The Advisory Committee notes specifically recognizes the use of subsequent remedial measures "for the purpose of showing that design changes and safeguards were feasible." *Id.*

the feasibility of alternative designs was a controverted issue at trial.[7] Thus, Rule 407 did not bar the admission of the plaintiff's evidence.[8]

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7. The plaintiff bore the burden of proving that Heil's product was "unreasonably dangerous." *See* Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978). The feasibility of alternative designs was a factor essential to her theory of the unreasonable danger the product posed. *Cf.* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 180 (3d ed. 1982) (feasibility will almost always be in question in design defect cases). Indeed, Colorado law recognizes that "the failure to provide safety devices can be the basis of a [strict liability] design defect case." *Union Supply,* 583 P.2d at 280. Heil did not stipulate that alternative designs were feasible, and the plaintiff was therefore obligated to prove this element of her case. The defendant cannot now assert that, because it did not attempt to rebut the plaintiff's proof, the issue was not controverted at trial. *See* Fed. R. Evid. 407 advisory committee note ("The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and *allows the opposing party to lay the groundwork for exclusion by making an admission.*") (emphasis added). We conclude that, under these circumstances, the feasibility of an alternative design is deemed controverted unless the defendant makes an unequivocal admission of feasibility. *See* 23 C. Wright & K. Graham, Federal Practice and Procedure §5288 at 144 (1980).

8. There is some dispute among the federal courts concerning the application of Rule 407 in strict liability actions. *See* Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983) (providing an exhaustive summary of the cases and commentary). A number of courts have applied Rule 407 to exclude evidence of subsequent remedial measures offered to prove that a product is defective. *E.g., Grenada,* 695 F.2d at 889; Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), *cert. denied,* ___ U.S. ___, 102 S.Ct. 2036 (1982); Werner v. Upjohn Co., 628 F.2d 848, 856-59 (4th Cir. 1980), *cert. denied,* 449 U.S. 1080 (1981). The Eighth Circuit does not follow this approach.

It holds that Rule 407 does not apply to strict liability cases. Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977). Having examined the conflicting authorities, we find none of their analyses persuasive.

As previously described, Rule 407 balances a social policy of encouraging repairs against a competing interest in the admission of relevant, probative evidence. In striking the balance, it announces a clear rule: repair evidence is not admissible to prove negligence or culpable conduct, but may be admissible for other purposes. Under this rule, admissibility is not determined by categorizing a party's legal theory as negligence or strict liability, but instead, by examining the contention that the evidence is offered to prove. In a strict product liability claim, negligence and culpable conduct generally are not relevant issues. Thus, any evidence offered to prove these issues generally will be inadmissible under the general requirements of relevance, *see* Fed. R. Evid. 402, even in the absence of Rule 407. Similarly, evidence of subsequent product changes will usually be irrelevant as direct proof of the ultimate contention that the product is unreasonably dangerous. Products are modified for a host of reasons unrelated to safety, and therefore the modification itself typically does not have any tendency to make more probable the past dangerousness of the product. *See* Fed. R. Evid. 401. Product modifications may be relevant, however, to factual issues that underlie the ultimate contention of dangerousness. For example, a product modification may demonstrate the feasibility of an alternative design (though it may not indicate that the alternative design is safer than an old design or that it was feasible at the time of first manufacture). *See* R. Lempert & S. Saltzburg, A Modern Approach to Evidence 189 (1977). Rule 407 does not exclude evidence offered to demonstrate such facts.

In *Grenada,* the Fifth Circuit reasoned that Rule 407 excluded subsequent repairs in strict product liability actions, primarily because "evidence of subsequent repairs or change has little relevance to whether the product in question was defective at some previous time," 695 F.2d at 887, and secondarily, because exclusion in strict liability cases serves purposes analogous to exclusion in negligence cases. *Id.* With respect to the first ground, we note that Rule 407 is an exception to the general rule that relevant evidence is admissible. We see no reason to interpret Rule 407 as imposing a relevance test, since that purpose is already served by Rule 402. With respect to the second ground, a ground relied on in *Cann* and *Werner,* we believe that this is flatly inconsistent with

the language of Rule 407. In effect, this approach redefines the terms "negligence" and "culpable conduct," to mean "product defects" when used in a strict liability case. This interpretation is reminiscent of Alice's encounter with Humpty Dumpty. *See* L. Carroll, Through the Looking Glass 198 (Messner ed. 1982) (" 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more or less.' ") Authorities adopting this approach claim that it is justified because it advances the policy of encouraging subsequent remedial measures. Such reasoning misconceives Rule 407. The rule does not encourage repairs at all costs; it balances this social policy against the competing interest in admitting relevant, probative evidence. *See supra* note 3. It strikes the balance, for better or worse, at excluding only that evidence offered to prove negligence or culpable conduct. Courts should show due respect for the careful consideration that preceded promulgation of the Federal Rules of Evidence. Absent evidence that either Congress, which prescribed the rules, the Supreme Court, which approved the rules, or the Advisory Committee, which drafted the rules, intended otherwise, we should apply Rule 407 as written. *Accord* Herndon v. Seven Bar Flying Service, Inc., No. 81-1805, slip. op. (10th Cir. Sept. 2, 1983). *Compare, e.g.*, Neb. Rev. Stat. §27-407 (1979) (specifically defining "negligence or culpable conduct" to include "manufacture and sale of a defective product").

An application of Rule 407 does not end our inquiry; the challenged evidence must pass muster under other rules of evidence as well. Heil claims that the evidence should have been excluded under Rule 403 because it was unfairly prejudicial. *See* Fed. R. Evid. 403. The Advisory Committee states that evidence is unfairly prejudicial if it has "an undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403 advisory committee note. We conclude that any such tendency in this case was eliminated by the court's instruction to the jury, cautioning it to consider the evidence only with respect to the feasibility of alternatives. We hold that Rule 403 did not bar admission of the evidence.

Heil further argues that, even if the evidence of subsequent design changes was admissible under the Federal Rules of Evidence, it was inadmissible under the substantive law of Colorado. Heil points to Colorado's codification of general provisions of product liability law, which provides in part as follows:

> In any product liability action, evidence of any scientific advancements in technical or other knowledge or techniques, or in design theory or philosophy, or in manufacturing or testing knowledge, techniques, or processes, or in labeling, warnings of risks or hazards, or instructions for the use of such product, where such advancements were discovered subsequent to the time the product in issue was sold by the manufacturer, shall not be admissible for any purpose other than to show a duty to warn.

Colo. Rev. Stat. §13-21-404 (Supp. 1982). Heil claims that this provision is binding on federal courts hearing products liability actions brought under Colorado law, notwithstanding any federal rule of evidence to the contrary. We need not reach the difficult and important issue concerning the reach of the Federal Rules of Evidence raised by Heil's claim [*see Oberst v. International Harvester Co.*, 640 F.2d 863, 867 n.2 (7th Cir. 1980) (Swygert, J., concurring and dissenting); *see generally* Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371 (1977)] because we do not believe the court violated §13-21-404 in admitting the disputed evidence and instructing the jury concerning it.

Although not free from doubt, we construe the statute as applicable only to scientific "advancements" in the sense of new discoveries after the original construction. Alternative concepts implemented later that were known as possible at the time of manufacture would not be excludable. We adopt this view because we believe it accords with the legislative scheme set out in Colo. Rev. Stat. §§13-21-401 to 405.

Under this statutory scheme, a product is presumed not to be defective if at the time of its sale it either conformed to the state of the art (as opposed to industry standards), or complied with any applicable state or federal statute or regulation. *Id.* §403(1)(a) & (b). On the other hand, a product is presumed defective if it failed to comply with an applicable government statute or regulation. *Id.* §403(2). We assume that a product's failure to conform to the state of the art at the time of its sale is evidence of a defect, although that failure does not rise to a presumption.

These provisions set the stage for proof of the state of the art at the time of the sale of the product. In order to prove the state of the art, evidence of what other manufacturers are doing is clearly relevant and admissible. Section 13-21-404, the statute at issue in this case, is not addressed to subsequent remedial measures by the manufacturer, but appears instead to cover scientific advancement made by *anyone* where such advancements were "discovered" subsequent to the time the defendant manufacturer sold the product in issue. Read together with section 13-21-403, the Colorado legislature was merely establishing in section 13-21-404 that subsequent scientific advancements are the flip side of the state of the art at the time of sale, *i.e.*, that if the design change or warning technique was not scientifically known at the time of the sale and therefore not state

of the art, it is simply not relevant to whether the product was defective. On the other hand, a subsequent scientific advancement is relevant to a manufacturer's duty to warn its previous purchasers, and therefore it is admissible to show such a duty.

Subsequent to the enactment of section 13-21-401 to 405, the Colorado legislature adopted its own identical version of Fed. R. Evid. 407. The Committee Comment states: "The phrase 'culpable conduct' is not deemed to include proof of liability in a 'strict liability' case based on defect, where the *subsequent measures are properly admitted* as evidence of the original defect. *But see* §13-21-404, C.R.S. 1973 (1978 Supp.)." Colorado Rule of Evidence 407, Vol. 7B Colo. Rev. Stat. (1982 Supp.) (emphasis added). Following the two earlier Colorado court decisions in *Roberts v. May,* 583 P.2d 305 (Colo. App. 1978), and *Good v. A. B. Chance Co.,* 565 P.2d 217 (Colo. App. 1977), the Colorado legislature chose to make Rule 407 inapplicable to products liability cases. The Comment establishes that the legislature contemplated the admission of some kinds of subsequent remedial measures in products liability cases, the exception being the limitation set out in section 13-21-404.

We read section 13-21-404 the way we do in part because it makes no sense that evidence of subsequent remedial measures would be admissible in Colorado to show feasibility in negligence cases, but not admissible in products liability cases under defendant's reading of the section. In our view, feasibility of alternative design is one way of establishing state of the art, proof of which is definitely contemplated by section 13-21-403.

Reading section 13-21-404 the way we do, we are of the view that the burden is upon the person who wants to muffle evidence to show that the advancement in question was "discovered" *subsequent* to the time of the sale. Here defendant argued that the section precluded admission of *any* subsequent remedial measure except to show duty to warn. Although defendant might have been able to make a case for application of section 13-21-404 to the valve design change that Heil patented, defendant failed to distinguish between that "subsequent discovery" and changes in the length of the shroud or use of a safety brace that were probably within the state of the art in 1972. Since defendant failed to show grounds for the application of the Colorado statute, and since 407 does not exclude this evidence, it is admissible under Rule 402.

The Decedent's Possession of Drug Paraphernalia

In the course of their investigation, the police inventoried Mr. Meller's personal possessions found at the scene of the accident. They discovered two hashish pipes containing marijuana residue in his rucksack. However, they found no evidence that he had used marijuana immediately before the accident.

Heil sought to admit the hashish pipes at trial, claiming that they were probative of the decedent's life expectancy and that they impeached prior testimony by the plaintiff. The district court excluded the pipes, concluding that their probative value was substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403. We agree. Heil provided no medical foundation for its claim that Mr. Meller's life expectancy was diminished by drug use. Furthermore, the pipes were of questionable value as impeachment material. Indeed, the testimony Heil sought to impeach

involved statements of questionable admissibility that Heil itself had elicited.[9] It appears that Heil sought to introduce the hashish pipes for the specific purpose of arousing juror sentiment against the decedent. The district court clearly acted properly in excluding this evidence.

Product Misuse

At the close of trial, Heil requested that the jury receive an instruction explaining the defense theory of product misuse. The court denied the request and concluded that the elements of the defense were absent in this case. The court did instruct the jury on the defense theory of assumption of risk; however, Heil argues that it was entitled to an instruction on product misuse as well.

Heil's product misuse defense is, in essense, that Mr. Meller caused his own death by choosing to position himself under the dump bed while greasing the truck chassis. As Heil recognizes, the product-misuse defense requires a showing that injury was caused by the dangerous misuse of a product in a manner that could not reasonably have been anticipated by the manufacturer. *E.g., Kinard v. Coats Co.*, 37 Colo. App. 555, 553 P.2d 835, 837 (1976). The defense protects the manufacturer who, in designing a product for a particular use, incorporates safety measures consonant

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9. Heil sought to impeach testimony elicited from the decedent's wife that Mr. Meller smoked marijuana only when offered the drug at the home of friends. Even assuming that the pipes suggested more frequent drug use, we find Heil's suggested inference of diminished life expectancy lacking sufficient support to overcome the danger of unfair prejudice.

with the full range of foreseeable applications. It recognizes that neither fairness nor the goals of enterprise liability are furthered by assessing liability for injuries arising out of unforeseeable applications of the product. *See generally* W. Prosser, Torts 641-82 (4th Ed. 1971).

Viewing the defense in this light, it would be a misapplication of language and law to describe Mr. Meller's accident as a result of product misuse. Mr. Meller was performing routine maintenance on the dump truck. To perform the maintenance, he had to work in close proximity to the dump bed assembly. Heil offered no substantial evidence that it could not reasonably foresee Mr. Meller's contact with a part of the dump bed assembly. Indeed, the record contains abundant evidence that Heil should have anticipated the likelihood that a person might place himself between the chassis and the dump bed and thereby encounter the obvious dangers associated with the trip cable. The court wisely declined to exhibit before the jury a defense theory that was unclothed by supporting facts. *See Smith v. Mill Creek Court, Inc.*, 457 F.2d 589, 592 (10th Cir. 1972); *Radio Corp. of America v. KYFM, Inc.*, 424 F.2d 14, 19 (10th Cir. 1970). Given the evidence adduced at trial, the court acted within its authority in denying the request for an instruction on product misuse. The district court properly distinguished the defense of assumption of risk, a defense that the jury rejected.

Sufficiency of the Evidence to Support the Verdict

The jury awarded the plaintiff $400,000 in damages (prior to addition of interest and costs), which represented Mr. Meller's discounted future earnings. Heil claims that this award is excessive, citing "an extremely unstable and irregular work background." Principal Brief for Appellant at 43.

At trial, the plaintiff's expert witness, an economist at Colorado State University, testified that the present value of the decedent's future earnings was $580,300.00. Heil had ample opportunity to rebut this testimony and, indeed, argued vigorously to the jury that the estimate was excessive. It appears that the jury, in exercising its duties as a finder of fact, gave substantial credence to the expert testimony. We conclude that the verdict is consistent with the evidence presented and represents a reasonable award of damages.

The Bill of Costs and Interest on the Judgment

The district court entered a judgment against Heil for $431,024.13 and asessed Heil with the costs of trial. The plaintiff cross-appeals from the judgment, claiming that the court erred in its calculation of the bill of costs and interest on the verdict.

The plaintiff claims that the court erred in excluding certain deposition and expert witness fees in the bill of costs. The plaintiff acknowledges that the award of costs is within the trial court's discretion. *See True Temper Corp. v. CF&I Steel Corp.*, 601 F.2d 495, 509 (10th Cir. 1979). We might, on occasion, question a court's decision to award no costs to a prevailing party. *See id.* We will defer broadly, however, to a district court's determination that certain elements of the bill of costs are not recoverable. The calculation of costs is too closely bound to the conduct of the trial to permit second guessing from the appellate bench. We therefore reject the plaintiff's demand for additional costs.

The plaintiff also claims that she is entitled to additional interest on the jury verdict. She argues that the district court

erred by calculating interest on the verdict from the date that the plaintiff's amended complaint was filed, rather than from the date the action accrued.

Colorado law specifies the method of calculating interest in personal injury judgments. It provides in part as follows:

> In all actions brought to recover damages for personal injuries. . . it is lawful for the plaintiff in the complaint to claim interest on damages alleged from the date said suit is filed; and, on or after July 1, 1979, it is lawful for the plaintiff in the complaint to claim interest on the damages from the date the action accrued. . . On actions filed on or after July 1, 1979, the calculation shall include compounding of interest annually from the date such suit was filed.

Colo. Rev. Stat §13-21-101 (Supp. 1982). The plaintiff filed her complaint on May 20, 1980. Thus, under the language of the statute, she was entitled to interest from May 21, 1979, the date the accident occurred and the cause of action accrued. However, the court did not apply the statute. Its decision apparently reflects retroactivity concerns. On the date of Mr. Meller's accident, the above-quoted provisions were not in effect; Colorado provided interest only from the date that the complaint was filed. *See* Colo. Rev. Stat. §13-21-101 (1973). Colorado added the above-quoted provisions on June 20, 1979. *See* 1979 Colo. Sess. Laws chap. 55, §3. The court apparently concluded that since the new provisions post-dated Mr. Meller's accident, application of the provisions to the plaintiff's case would violate retrospectivity proscriptions in the Colorado Constitution.

The Colorado Constitution provides that "no...law ...retrospective in its operation...shall be passed by the general assembly." Colo. Const. art. II, §11. The Colorado Supreme Court has stated that a law is retrospective if it "abrogates an existing right of action or defense, or creates a new obligation on transactions or considerations already past." *California Co. v. State*, 141 Colo. 288, 348 P.2d 382, 399 (1959) (quoting *Evans v. City of Denver*, 26 Colo. 193, 57 P. 696, 697 (1899)). It has explained that the purpose of the constitutional provision is "to prevent the unfairness entailed in altering the legal consequences of events or transactions after the fact." *Northern Natural Gas Co. v. Public Utilities Commission*, 197 Colo. 152, 590 P.2d 960, 962 (1979). The court has held, however, that the legislature may create new remedies for injury where none existed before. In *Jefferson County Department of Social Services v. D.A.G.*, ____ Colo. ____, 607 P.2d 1004 (1980), the court concluded that a child could bring a paternity action against a putative father under a statute passed after the child's birth. The court stated that "[t]he abolition of an old remedy, or the substitution of a new one...constitutes [neither] the impairment of a vested right nor the imposition of a new duty; for there is no such thing as a vested right in remedies." 607 P.2d at 1006.[10]

The amendments to the Colorado interest statute increase the allowable damages to a prevailing plaintiff. They therefore constitute an alteration in the measure of a

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10. In *Jefferson*, the court did not discuss whether the new remedy imposes a new obligation on a past transaction. *See California Co.*, 348 P.2d at 399. The court apparently applies the "new obligation" test only in cases involving contractual transactions. *See, e.g.*, Bonfils v. Public Util. Comm'n, 67 Colo. 563, 189 P. 775 (1920).

remedy. We believe that the Colorado Supreme Court would conclude, under the reasoning of *Jefferson*, that the application of these amendments to the instant case does not violate the constitutional ban on retroactive laws. The amendments do not impair a right vested in Heil; *Jefferson* makes clear that a defendant does not have a vested right in the application of a given remedial scheme. Furthermore, the amendments do not impose an additional duty on Heil; only the measure of damages that result from the violation of a duty has changed. We conclude that Colorado precedent indicates that Colo. Rev. Stat. 13-21-101 should be applied as presently written. The plaintiff is entitled to the full measure of interest specified in the statute.

Conclusion

The judgment of the district court is affirmed with respect to all issues except the calculation of interest on the damage award. The case is remanded to the district court for addition of interest in the amount provided by Colo. Rev. Stat. §13-21-101 (Supp. 1982).

JANUARY TERM—February 21, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

JESSIE W. MELLER, individually and as Next Friend of CHAVA PRATRICE MELLER,	)	
Plaintiff-Appellee, Cross-Appellant,	)	Nos. 82-1858 & 82-1883
vs.	)	
THE HEIL COMPANY,	)	
Third Party Defendant-Appellant, Cross-Appellee.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

No. 83-1672

In The
Supreme Court of the United States
October Term, 1983

THE HEIL COMPANY,

Petitioner,

vs.

JESSIE W. MELLER,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 28, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether evidence of subsequent remedial measures implemented by a defendant manufacturer in a products liability case alleging strict liability is admissible under Federal Rule of Evidence 407 where the defendant contests the feasibility of such precautionary measures during discovery unless the defendant unequivocally admits by formal stipulation that such precautionary measures were feasible at the time of manufacture even though the issue of feasibility of precautionary measures was not ultimately contested at trial by the defendant.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has been attached, as Appendix A, to the Petition for Writ of Certiorari filed by the Petitioner in the instant case.

STATEMENT OF THE CASE

The Petitioner is the manufacturer of a component part package assembly for a dump truck. The assembly includes the dump bed, hydraulic hoist system, and all component parts for forming an appropriate truck chassis into a dump truck. Petitioner's design includes a "trip cable" which is a wire cable running from the hydraulic control valve at the base of the hydraulic cylinder, to the rear of the truck where it is attached to the bottom end of the dump bed. The purpose of the "trip cable" is to prevent overextension of the hydraulic cylinder. Petitioner's design included a piece of metal tubing through which a portion of the middle part of the "trip cable" passed to protect it from contact. At either end of the metal shroud portions of the "trip cable" were left exposed to contact.

On May 21, 1979, Jean Meller was killed in an accident in Pitkin County, Colorado. Mr. Meller was employed by the Grande Corporation as a dump truck driver. Included in his duties was the performance of routine maintenance on the truck he was driving. On the date of the accident, Mr. Meller was attempting to lubricate the rear drive shaft of the truck. The zerk fitting for this lubrication is located on the drive shaft between the dual wheels at the rear of the truck. To reach the zerk, Mr. Meller had the dump bed in a fully upright position. Standing between the dual wheels, Mr. Meller placed himself between the chassis of the truck and the raised bed, reaching over and down to obtain access to the greasing point. While making this attempt, Mr. Meller inadvertently came in contact with the "trip cable" which

switched the control valve to the lower position. This caused the bed to rapidly descend, trapping Mr. Meller between the chassis and the dump bed. No one witnessed the accident, but Mr. Meller was ultimately found dead in this trapped position.

As a result of Mr. Meller's death, Mrs. Meller filed suit against the Petitioner alleging, among other things, that the Petitioner was strictly liable in tort in that the design of the dump bed assembly was unreasonably dangerous, and that Petitioner failed to properly warn users of the product of these dangers. These allegations were specifically denied by the Petitioner in its Answer.

Extensive discovery was then undertaken by both sides including the submission of a report and deposition of Petitioner's expert. Throughout discovery, Petitioner claimed that its product essentially conformed to the state of the art and that the product was, therefore, not dangerous. This position inherently includes the proposition that a safer design or better warning was not feasible at the time the Petitioner manufactured its product.

Since Petitioner knew the testimony Respondent proposed to adduce at trial, Petitioner filed a Motion in Limine requesting the trial court to exclude any subsequent remedial measures taken by the Petitioner either in its design, or in its warnings. Considering Rule 407 of the Federal Rules of Evidence, the trial court ruled that evidence of subsequent remedial measures could be introduced by the Respondent to show the feasibility of precautionary measures, and that a limiting instruction would be given to the jury. Aware of this ruling, at no time did the Petitioner, in any manner, admit that precautionary

measures were feasible at the time of the manufacture of the product. Indeed, Petitioner not only maintained its denial of liability; Respondent's witnesses were vigorously cross-examined concerning the feasibility of precautionary measures at the time of manufacture, and Petitioner's expert was still endorsed as an expected witness at trial.

After judgment was entered in the trial court, Petitioner appealed to the United States Court of Appeals for the Tenth Circuit alleging as error, for the first time, that the feasibility of precautionary measures at the time of manufacture were not controverted. This was never brought up in the trial court. This contention was seemingly based on their tactical decision at trial not to present any evidence to rebut that adduced by Respondent as to the feasibility of precautionary measures. The Court of Appeals held that this position was not well taken, noting that Respondent bore the burden of proving the product was "unreasonably dangerous," and Respondent was therefore obligated to prove this element of her case [Petitioner's Appendix, A-6, fn. 7]. With the limiting instruction given by the court, Respondent did nothing more than meet her burden of proof as required. This burden was met in strict compliance with Fed. R. Evid. 407. The prejudice, if any, to the Petitioner came from the Petitioner's decision not to present any evidence to rebut the evidence of the Respondent.

REASONS FOR DENYING THE WRIT

Petitioner seeks a writ from this court because of a tactical decision it made at trial in this particular case, not because of any alleged conflicts with the decisions of

the Courts of Appeals to the proper interpretation and application of Fed. R. Evid. 407 which requires a decision by this court. As can be seen from Petitioner's opening paragraph under its "Reasons for Granting the Writ," Petitioner's primary focus is directed toward the admission of subsequent remedial measures because Petitioner chose not to present any evidence at trial concerning the feasibility of such measures.

As an evidentiary exclusionary rule, Rule 407 is an exception to the general rule that relevant evidence meeting other requisites of the Federal Rules of Civil Procedure is admissible. Thus, it should be construed as written [Petitioner's Appendix, A-8, fn. 8].

Rule 407 consists of two sentences. Each is very clear and deals with different situations. The first sentence reads:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence of culpable conduct in connection with the event. . . .

It is clear that evidence of subsequent remedial measures introduced only for the purpose of proving negligence or culpable conduct is not admissible. The second sentence reads:

> . . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The second sentence does not provide exceptions to the first sentence. It simply supplies, by way of example, when evidence of subsequent remedial measures is ad-

missible. Thus, even when the Petitioner's negligence is an issue, evidence of subsequent remedial measures can still be introduced for other purposes. When this evidence is introduced in such a case, a limiting instruction, however, should be given. *Unterburger v. Snow Co., Inc.*, 630 F.2d 599 (8th Cir. 1980). Even where negligence on the part of the defendant is not alleged, as in this case, a precautionary instruction is helpful to avoid any inference of negligence on the part of the defendant to the jury. Such an instruction was given by the trial court in this case where it stated to the jury that the design changes: "are not to be considered as an admission that earlier design was defective in any way, but simply that there is possibly an alternative feasible design, another way to do it, in other words." [Petitioner's Appendix, A-4]. It was, therefore, clear to the jury the purpose for which the evidence was being introduced thereby nullifying any tendency that the jury could treat the evidence as an acknowledgment on the part of the defendant that there was an unreasonable hazard present. *Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983).

Seeing that the evidence of subsequent remedial measures was admitted for a very specific purpose, that must now be analyzed in light of Petitioner's contention that the feasibility of the measures must also be "controverted." Petitioner, as a products manufacturer, would have all plaintiffs alleging that a product as designed was dangerous, and choosing to go to trial, try their case in the dark. Their reading of Rule 407 is an attempt to severely increase the plaintiff's burden of proof in a products liability action by allowing the defendant to exhibit all of the

plumage of contesting feasibility of subsequent precautionary measures prior to trial and then molting after the plaintiff's case. This would put the plaintiff in the precarious position of being: "You're damned if you do, you're damned if you don't." If the plaintiff in his case in chief chose not to put on evidence of subsequent remedial measures, this would leave the manufacturer/defendant free to contest feasibility in his case in chief. Of course, the plaintiff could then put on rebuttal evidence, but then the evidence comes across more as a defense to what the defendant has adduced, thereby losing the impact of what the plaintiff is attempting to prove.

Conversely, if plaintiff were to put on evidence of subsequent remedial measures, even with a limiting instruction, manufacturer/defendants could always decide not to put on any evidence "contesting" feasibility thereby allowing them a substantial likelihood of a reversal should the verdict be adverse to them.

Such an approach completely ignores the basic concept that plaintiff bears the burden of proving the product is unreasonably dangerous, and that the feasibility of alternative designs is an essential factor to her theory of the case [Petitioner's Appendix, A-6, fn. 7]. "The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the ground work for exclusion *by making an admission.*" (Emphasis added.) 2 *Weinstein's Evidence* § 407-3 (1982), citing Fed. R. Evid. 407, Advisory Committee's Note. In other words, Petitioner could have easily avoided what it now claims to be prejudicial evidence, by simply informing the Respondent

and the court that it did not contest the feasibility of subsequent remedial measures. This, however, it failed to do, apparently thinking that this would provide it with grounds for appeal should the judgment be adverse.

The second thrust of Petitioner's argument is saturated with the emotional appeal that: "The salutary social policy behind the rule is to encourage manufacturers to improve the safety of their products without fear that evidence of such changes will be used against them in personal injury actions arising out of products from previous generations of the product line." (Petitioner's Brief, p. 5). ". . . The manufacturer is forced to choose between modifying the design of its product when safer, more advanced technology is available, and the unavoidable inference, if evidence of such changes is admissible, that the previous product was 'unsafe' merely because the modification reflects a more advanced design. . . ." (Petitioner's Brief, p. 6). Although pleasing to emotions and logic, Petitioner's argument completely ignores the basic premise of products liability. That is, if a manufacturer places a dangerous product on the market when, at the time, safer designs were feasible, then it should be held liable for damages caused by the dangerous product.

> Employing Rule 407 to exclude evidence of the product's safety that is relevant, and not prejudicial, as determined under Rules 401 and 403, would thwart the policies that underlie strict liability by an illogical imposition of a negligence based rule of evidence. *Herndon v. Seven-Bar Flying Service, Inc.*, 716 F.2d 1332 (10th Cir. 1983).

The ruling of the United States Court of Appeals for the Tenth Circuit is only dispositive of the applicability of Rule 407 in this case. It cannot be defined as a decision

in conflict with other Courts of Appeals. Respondent has no idea what the posture of proceedings were in other cases prior to trial, but submits that the posture of each case, as trial commences, is dispositive of the application of Rule 407. The issue thus presented to this court based on a peculiar set of facts does not warrant the intervention of this court in such an insignificant matter. Nor does the alleged conflict between the Courts of Appeals require intervention since the decisions are essentially limited to the facts of each particular case, no discernable conflict really exists.

CONCLUSION

Based upon the arguments contained herein, Respondent respectfully requests that the Petitioner's Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals be denied.

Respectfully submitted,

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